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Supreme Court of the United States

OCTOBER TERM 1967

No. [redacted]516

THE SUPERIOR OIL COMPANY,
and
J. RAY McDERMOTT & CO., INC.,
Cross-Petitioners,

versus

FEDERAL POWER COMMISSION, ET AL.,
Cross-Respondents.

REPLY BRIEF ON BEHALF OF THE SUPERIOR OIL COMPANY AND J. RAY McDERMOTT & CO., INC. TO BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION.

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The Brief in Opposition makes two points: first, that the petitioners' contentions are foreclosed by this Court's decision in *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223; second, that the question presented by the petition was not raised by the petitioners in their applications for rehearing to the Commission.

1. The Brief in Opposition misinterprets the questions presented by the petition and erroneously restates the petitioners' contentions. By so doing, it

is able to urge that the restated "contentions" have been foreclosed by this Court's holding in *Callery*. But even as restated, the contentions regarding settlement prices are not foreclosed because *Callery* did *not* pass upon the effect to be given settlement prices since the issue was not before the Court, not having been passed upon by the Court of Appeal.

The petitioners have restricted their complaint here to their April 27, 1960, Federal domain gas sales contracts. The Court below affirmed the Commission in finding a price "line" for the period January 1, 1960, to October 25, 1960, of 18.5c for on-shore sales, which it applied to Federal domain sales between January 1, 1960, and December 31, 1962. In order to do this, the Commission had (a) excluded from consideration 1958 permanent certificates affecting the Federal domain area, (b) disregarded eight contemporary temporary certificates at higher prices affecting the Federal domain area, and (c) did not use at all in its calculations a number of permanent certifications during the relevant period at prices higher than 18.5c, which were the result of settlements.

Thus, the evidence in the record showed that *all* certificated Federal domain offshore South Louisiana sales dated subsequent to 1956 were certificated at prices higher than 18.5c per Mcf, and that during the relevant period 1957-1960, there were twelve permanent certifications, ten at 19c per Mcf covering more than 35,000,000 Mcf of annual sales, one at 18.75c per Mcf covering 14,000,000 Mcf and one at 19.5c per Mcf

covering 1,500,000 Mcf of annual sales, these latter occurring in settlement cases (Petition, pp. 4-5). In other words, if the Commission had considered the evidence in the record relevant to offshore sales it could not have arrived at a "line" as low as 18.5c. The lower court misconstrued the record in approving the Commission's disregard of settlement prices (see Petition, pp. 5-6), and therefore compounded the error.

Callery did not, and could not have passed upon these issues, because they did not exist in relation to the *Callery* record. They do exist here.

2. Petitioners *did* raise the questions here presented in their application to the Commission for rehearing. (See Superior's application, pars. 9 and 10, R. 402; McDermott's application, pars. 3(a), (b), (e), 4, R. 446-9) These were raised in a context of challenging both onshore and offshore determinations and covered the exclusion of the permanently certificated settlement prices and other certificated prices which the Commission, following the Presiding Examiner, had ignored. The fact that petitioners, in the light of the later action of the Court of Appeal, here chose to complain only of the "in line" findings made as to their 1960 Federal domain contracts does not devitalize the broader challenge levelled in the rehearing applications.

CONCLUSION.

It is respectfully submitted that the petition should be granted.

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